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PRIMOGENITURE AMONG MOTHERS.

The question we propose to discuss is whether in the case of competition to succeed to an impartible estate between two females both of whom are entitled to claim as mothers, primogeniture depends upon priority of marriage or upon seniority of age. Under the Mitakshara system of law, at any rate, the position is clear. If the estate be partible, each would be entitled to an equal share as in the case of other co-heirs. Succession by primogeniture is not a part of ordinary Hindu Law, but is engrafted on it by custom which obtains in almost all the ancient Zemindaries in Southern India and has been judicially recognised and affirmed. In the absence of any special usage or custom to regulate primogeniture the criterion on which primogeniture depends is the seniority of age among the co-heirs. If by custom an estate be impartible and descendible to a single heir, that heir ordinarily is the eldest among those, whether males or females who, if the property were partible, would succeed as co-heirs entitled to equal shares (1). Though this may be the general principle, yet it may be said that it has to be modified when applied to the case of succession of the wives to the husband and, therefore, to the case of succession of mothers to the estate of a son. In the former case, the impartible estate of the husband would, no doubt on his death, devolve on his senior wife (2). Seniority among wives will be determined not with reference to their ages but with reference to the priority of their marriages. The relationship from which the right of inheritance springs in the case of a wife dates only from her marriage and not from the date of her birth. In the case of a person marrying several wives at different times, the wife first married acquires the relationship of wife first and the others

(1) *Muttuvaduganadha* v. *Dora Singha,* I. L. R., 3 M., pp. 328 and 329.

(2) Mayne's Hindu Law and Usage, para, 509,

in the order of their marriages, respectively. When there is a competition among wives to succeed to the impartible estate of their husband the right of primogeniture among them depends upon the question which, among them, became first his wife and not on the question, which of them was born first. But this principle is totally inapplicable to the succession of a mother to her son, for the relationship from which alone the right of inheritance springs, begins from the date of the birth of the son and not from the date of her marriage with the father. If, in the case of an adoption by a person having several wives, all the wives have to be considered in law the mothers of such adopted-son, then they all became related to him as mothers at one and the same time and there can, therefore, be no priority among them in respect of their relationship as mothers; and the right of primogeniture should only be regulated by the ordinary rule of seniority in age. It is, therefore, clear that there is no analogy between competition among wives for the estate of their husband and competition among mothers for the estate of their son. The latter is analogous to the case of several wives who were all married at one and the same time in which case if a competition should arise among such wives for their husband's impartible estate, primogeniture will have to be determined with reference to seniority in age. The question is practically decided in favour of the senior in age by the decisions of their Lordships of the Judicial Committee of the Privy Council in the Oorkad case (3), and in the Bangaripoliem case(4). In the Oorkad case the competition was between the sons by the 2nd and 3rd wives of whom the son by the 3rd wife was senior in age to the son by the 2nd wife. The question of law raised for decision was whether primogeniture was to be determined by the priority of birth of the competing sons, or by the priority of marriage of their mothers. If the competition had been among the wives, the husband having died without male issue, the 2nd wife would have succeeded in preference to the 3rd wife, though the latter might have been senior in age. Their Lordships of the Privy Council after an elaborate examination of the various texts of Hindu Law bearing on the question, affirmed the decision of the High Court that primogeniture among sons by

(3) *Ramalakshmi* v. *Sivanantha Perumal*, 14 Moore's I. A., p. 570.

(4) *Pedda Ramappa* v. *Bangari Seshamma*, I. L. R., 2 M., 286.

different wives depended not upon the priority of marriage among their mothers but upon the seniority of age among the several sons. The Judicial Committee, however, in that case reserved its opinion as to whether in the case of a competition between the son of a *Pattama stri*, or the first married wife, and the son by a subsequently married wife the right of primogeniture may not be in favour of the son by the 1st married wife, though that son be younger in age to the son of the subsequently married wife. This point was raised and considered in the latter case (Bangaripoliem case) (5) by the Judicial Committee of the Privy Council and it was there held that the ordinary rule of primogeniture among sons, affirmed in the Oorkad case was equally applicable when the competition is between the son by the *Pattama stri* or first married wife and a son by a subsequently married wife. If priority of marriage among mothers is not to be taken into consideration in determining the right of primogeniture among their sons, there is no reason why that should be taken into consideration as regulating primogeniture among the mothers themselves when they compete for the estate of the deceased adopted son. The basis on which the author of the Mitakshara places the mother's right of succession to her son puts the matter beyond all doubt. It is by reason of her propinquity (6) to her son that the author of the Mitakshara places her even before the father in the table of inheritance. This has also been judicially affirmed and acted upon (7). It need hardly be stated that the Mitakshara is of paramount authority in the presidency of Madras. One's step-mother though she is also wife of the father just like his own mother is not recognised as an heir at all in Madras (8). Under the Mitakshara Law as it is administered in Bombay a step-mother as also wives of all other gotraja sapindas are brought in the line of heirs. But in the presidency of Madras, the step-mother and the other female gotraja sapindas are not recognised as heirs (9). On principles of Hindu Law, and especially under the Mitakshara

(5) *Pedda Ramappa* v. *Bangari Seshamma*, *supra*.

(6) Mayne's Hindu Law and Usage, para. 521.

(7) *Balkrishna Bapuji* v. *Lakshman Dinkar*, I. L. R., 14 B., 605.

(8) *Kumaravelu* v. *Virana Goundan*, I. L. R., 5 M., pp. 29 and 32, *Mari* v. *Chinnammal*, I. L. R., 8 M., 107 and *Ramasami* v. *Narasamma*, *Ib.* 8 M., 183.

(9) *Balamma* v. *Pullayya*, I. L. R., 18 M., 168. *Thayammal* v. *Annamalai Mudali*, I. L. R., 19 M., 35.

system of Law, as it is administered in Madras, the mother's right of succession is independent of the father and not by reason of her being the wife of the father. In the case, therefore, of a competition among mothers, the preferential right should not be determined with reference to the priority of their marriages. In the Uttumalai case, Mr. Justice Shephard did not consider this question, but Mr. Justice Best refers briefly to the arguments, *pro* and *con*, (10) and though he does not definitely decide the point, he strongly indicates his opinion that, when the succession is to the son and not to the husband, priority of marriage is not the criterion for determining the right of primogeniture.

In the Uttumalai case, the son's estate was one which devolved on him from his father. Suppose it had been his self-acquisition and not derived from the father, would the rule of primogeniture, as between the mothers, be determined by the priority of marriage. If not, why should the fact that the son inherited the estate from the adoptive father make any difference? Attention may also be invited to the fact, that unlike the English Law, the Hindu Law recognises heritable blood between the mother and her (11) son even though he may not be the offspring of a marriage.

JURISPRUDENCE.

FRIVOLOUS AND VEXATIOUS ACTIONS.

There is no provision in the Code of Civil Procedure enabling a Court of Justice to reject frivolous and vexatious plaints or strike out defences of that character. S. 53 authorizes the rejection of a plaint if it does not disclose a cause of action at or before settlement of issues; and S. 54, Clause *c*, directs the rejection of the plaint if the suit appears from the statement in the plaint to be barred by any positive rule of law. Rule 4 of Order 25 under the Judicature Acts in England provides as follows:—"The Court or a Judge may order any pleading to be struck out on the ground that it discloses no reasonable cause of action or answer; and in any such case or in case of the action or defence being shown by the plead-

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(10) *Annapurni Nachiar* v. *Collector of Tinnevelly*, I. L. R., 18 M., 278.
(11) *Myna Bai* v. *Uttaram*, 2 M. H. C. R., p. 201.

ings to be frivolous or vexatious, the Court or a Judge may order the action to be stayed or dismissed or judgment to be entered accordingly as may be just." It will be observed that the rule relates both to the statement of claim and the answer; and apart from the case of absence of cause of action or reasonable defence it makes special reference to frivolous and vexatious claims and defences. The rule enacted in S. 53 of the Procedure Code that a plaint may be rejected if it does not disclose a cause of action corresponds to the first part of Rule 4. With regard to defences, there is no express provision authorizing the striking out of defences. S. 116 empowers the Court to reject or to direct amendment of, argumentative or prolix written statements or statements containing matter irrelevant to the suit. S. 146 states in the last clause that nothing in the section requires the Court to frame and record issues when the defendant at the first hearing of the suit makes no defence. And S. 152 provides that if at the first hearing of a suit it appears that the parties are not at issue as to any question of law or of fact, the Court may at once pronounce judgment. S. 153 deals with the case of one of several defendants having no defences. These provisions may be regarded as corresponding to that part of rule 4, Order 25, which deals with the absence of a reasonable answer and authorizes judgment to be entered accordingly. There seems however to be no provision in the Indian Code corresponding to that part of the English rule which deals with an action or defence that is frivolous or vexatious and authorizes the Court to stay or dismiss the action or give judgment accordingly. As pointed out already, Cl. *c* of S. 54 directs the rejection of a plaint if from the statement in the plaint it appears that it is barred by any positive rule of law. This provision may fall within the scope of the English rule empowering the staying or dismissal of frivolous or vexatious actions. But the English rule is very much wider. An action being barred upon the face of the plaint by a positive rule of law is only one of the numerous cases in which an action may be frivolous or vexatious. It may not appear on the face of the plaint that it is barred, but it may be apparent the moment the defence is put in. There may also be actions which are frivolous or vexatious which are not barred by any positive rule of law. And there may likewise be frivolous or vexatious defences. It will thus be clear that the English rule

enables courts to render speedy justice by staying actions or entering judgment for the plaintiff where vexatious claims or defences are made—a power which the Courts in this country ought also to possess, but apparently do not, under the provisions of the Code of Civil Procedure. But apart from the Code of Civil Procedure, is there any inherent power in a Court of Justice to stay a vexatious claim or strike out a frivolous or vexatious defence and give judgment. There is abundant authority in England to show that there is such a power; and if apart from powers which are the creatures of statute, there is a power inherent in every Court of Justice to prevent an abuse of its process, the Courts of India must be deemed to possess it.

In *Metropolitan Bank* v. *Pooley*, 10 A.C., 210, a bankrupt whose adjudication at bankruptcy had not been set aside, sought to maintain an action for maliciously procuring the bankruptcy. The House of Lords held that the action was liable to be summarily dismissed upon summons as frivolous and vexatious. The Lord Chancellor *Selborne* observed:—"Before the rules were made under the Judicature Act, the practice had been established to stay a manifestly vexatious suit which was plainly an abuse of the authority of the Court although so far as I know there was not at that time either any statute or rule expressly authorizing the Court to do it. The power seemed to be inherent in the jurisdiction of every court of justice to protect itself from the abuse of its own procedure." After referring to the older practice of objection by demurrer and quoting the language of rule 4, Order 25, his Lordship proceeded:—"In this case the form of the application to the Court was that the action should be dismissed as frivolous and vexatious and not on the ground that the pleading did not disclose a reasonable cause of action. Nevertheless it is an element of primary importance, in determining the question whether the action was frivolous or vexatious, to consider what sort of cause of action, if any, appears on the face of the pleading," p. 215. His Lordship then referred to the adjudication in bankruptcy, the dismissal of the appeal from the adjudication, the application to annul the bankruptcy upon allegation of conspiracy to procure his ruin and the dismissal of that application. His Lordship then referred to the delay in the institution of the present proceeding, and expressed his conclusion that it was frivolous and vexatious. Lord *Blackburn*

followed. He added "But from early times (I rather think, though I have not looked enough to say, from the earliest times) the Court had inherently in its power the right to see that its process was not abused by a proceeding without reasonable grounds so as to be vexatious and harassing—the Court had the right to protect itself against such an abuse; but that was not done upon the demurrer, or upon the record, or upon the verdict of jury or evidence taken in that way, but it was done by the Court informing its conscience upon affidavits, and by a summary order to stay the action which was brought under such circumstances as to be an abuse of the process of the Court; and in a proper case they did stay the action." pp. 220 and 221.

In *Lawrance* v. *Norreys*, 15 A. C., 210, which was an action to recover an estate which had long been in the possession of others alleging concealed fraud which could not have been discovered before, Lord *Herschell* delivering the leading Judgment observed:—"It cannot be doubted that the Court has an inherent jurisdiction to dismiss an action which is an abuse of the process of the Court. It is a jurisdiction which ought to be very sparingly exercised and only in very exceptional cases. I do not think its exercise would be justified merely because the story told in the pleadings was highly improbable and one which it was difficult to believe could be proved. * * We have, to begin with, a statement of claim which, if it discloses a concealed fraud within the meaning of the statute, does so in the barest fashion, with much that is most material left vague and undefined, when there ought to have been distinctness and precision. Moreover, this is not the first but the third edition of a statement of claim delivered with the object of recovering the Towneley estate; and when we review the history of the litigation there is much to lead to the belief that important allegations now made were an after-thought, the result of criticism of the earlier form in which the charges of fraud were presented and that the charges thus raised against persons long dead are wholly incapable of proof," p. 219. Upon these grounds the House came to the conclusion that the action was an abuse of the process of the Court.

In *Willis* v. *Earl of Beauchamp*, 11 Probate Division, p. 59, which was an action brought to obtain revocation of letters of

administration granted in 1798, the plantiff claiming to represent the next of kin of the intestate and the defendants being the representative of the deceased administrator, the Court of Appeal held that the action was frivolous and vexatious having regard to the lapse of time, the fact that the defendant could not and would not succeed to the administration sought to the revoked and the other circumstances of the case. The Lords Justices pointed out that Order 25, rule 4, applied only to what appeared on the pleadings and enabled the Court to reject it if on the face of the pleadings the action was frivolous and vexatious. *Bowen* L. J. said "It does not fall under the rule, but the rules, as we have pointed out more than once, do not and that particular rule (Rule 4) does not, deprive the Court in any way of the inherent power which every Court has, to prevent the abuse of legal machinery which would occur, if for no possible benefit the defendants are to be dragged through litigation which must be long and expensive." p. 63. The same view was taken of the power of the Court even before the rule under the Judicature Acts by the Court of Exchequer in *Castro* v. *Murray*, L. R. 10, Exchequer 213.

In *McDougall* v. *Knight*, 25 Q. B. D., p. 1, the Court of Appeal holding that a plea of *res judicata* must succeed, the questions for the jury in the second action for libel being identical with those decided in the first, directed the action to be stayed as frivolous and vexatious.

In *Stephenson* v. *Garnett*, [1898] 1 Q. B., 677, the Court of Appeal held that the question raised in the action was identical with that decided by the County Court Judge upon the interlocutory application and had deen decided by a Court of competent jurisdiction and that the action ought therefore to be stayed as frivolous and vexatious and an abuse the process of Court.

The same principle has been applied with reference to striking out defences and entering judgment for the plaintiff where the plea has been regarded as frivolous or vexatious. In 14 A. C., 665, *Lord Halsbury* said "I think it would be a scandal to the administration of justice if, the same question having been disposed of in the case, the litigant were to be permitted by changing the form of the proceedings to set up the same case again." He proceeded to

add "I believe there is an inherent jurisdiction in every Court of Justice to prevent such an abuse of procedure." p. 668.

In *Remington* v. *Scoles* [1897] 2 Ch. 1, a defendant delivered a statement of defence in which he either denied or refused to admit each of the allegations in the statement of claim, but set up no case of his own. In previous proceedings in another action he had admitted upon oath several of the material statements which he now denied and had not denied any of the others. It was held by the Court of Appeal that though the Court would not upon affidavit evidence order a pleading to be struck out on the ground that the statements in it were false, the circumstances in the case showed the statement of defence to be frivolous and vexatious and one which ought to be struck out as being an abuse of the procedure of the Court. In the Court below Mr. Justice *Romer* observed that evidence may be received in a proper case on a motion of that kind to show that the pleading was an abuse of the process of the Court. After referring to the inherent jurisdiction of the Court to strike out a vexatious defence, Lord Justice *Lopes* said "To induce the Court to exercise this jurisdiction, it is not enough to satisfy the Court that the allegations of fact in the statement of defence or in the statement of claim as the case may be, are improbable or false, for to enter upon the question of their truth or falsehood would be trying the action prematurely. Having regard to the character of this defence, bearing in mind what is known about the case beforehand and what is known about the previous proceedings in the case, this is a sham defence and it has been set up, not honestly and *bonâ fide* as a substantial defence, but for the purpose of delay." p. 7.

In the course of the foregoing pages it must have become apparent that this jurisdiction to deal with vexatious or frivolous claims and defences is inherent in every Court of Justice, and that this power has been invoked to deal with cases which could not fall within the four corners of the English rule. Courts of every country must be deemed to possess this power. In a case from Madagascar *Haggard* v. *Pelicier Freres*, [1892] A. C., p. 61, Lord *Watson* delivering the judgment of the Privy Council where the action was brought against a judge for having dismissed an action summarily as fri-

volous and vexatious expressed himself thus:—"Their Lordships hold it to be settled that a Court of competent jurisdiction has inherent power to prevent abuse of its process, by staying or dismissing without proof actions which it holds to be vexatious." pp. 67, 68. Courts in India appear to us therefore to have the power which is claimed as inherent in every Court although it is not conferred by the Code of Civil Procedure. As regards plaints it is not merely where they do not disclose a cause of action or the claim upon the face of the plaint is barred by any positive rule of law, but even where otherwise they are shown to be frivolous and vexatious as in the case of concealed fraud, (*Lawrance* v. *Norreys*, 15 A. C., 211), or in the case of a perfectly stale claim, the Courts in India have the power which is certainly to be sparingly and cautiously exercised but exercised firmly and unhesitatingly where the circumstances require it, of summarily dismissing the action; and the same power is possessed by them of striking out a frivolous or vexatious defence and entering judgment for the plaintiff. There are no cases in the Indian Reports to show that such a power has ever been exercised. It was once exercised in a recent litigation relating to the Shivaganga Zamindary by a Subordinate Judge; but although the case went up to the High Court on appeal, it was unnecessary for the Appellate Court to pronounce any opinion upon this novel and *salutary* departure from the practice of the Courts.

The anxiety to suppress vexatious actions as speedily as possible and to save the defendant from being harassed by them has been so keenly felt by the British Legislature that a special statute has been enacted the provisions of which might well be reproduced Ch. 51 of 59 and 60 Vict., S. 1, enacts as follows:—

"It shall be lawful for the Attorney-General to apply to the High Court for an order under this Act, and if he satisfies the High Court that any person has habitually and persistently instituted vexatious legal proceedings without any reasonable ground for instituting such proceedings, whether in the High Court or in any inferior Court, and whether against the same person or against different persons, the Court may, after hearing such person or giving him an opportunity of being heard, after assigning counsel in case such person is unable on account of poverty to retain counsel, order that no legal proceedings shall be instituted by that person

Majesty's Government—an act on the part of the plaintiff which was a crime within the meaning of S. 11, Foreign Enlistment Act, 1870—and brought this action for damages for various injuries and losses which resulted in the course of that expedition, it was held by the Court of the Queen's Bench (*Grantham* and *Kennedy*, JJ.) that a person induced by false representations of another, to do an act which was really a crime but which by reason of such representation the plaintiff thought, was neither illegal nor immoral, could bring an action for damages resulting from the act.

Landlord and Tenant—Breach of Covenant—Mistake—Forgetfulness—Equitable relief against forfeiture.

Eastern Telegraph Company, Limited, v. Dent and Others. [1899] 1 Q. B., 835 C. A.

In this case it was held by the Court of Appeal (*A. L. Smith, Collins* and *Romer*, L. JJ.) in confirmation of the Judgment of *Kennedy* J. that where the lessees without the permission of the lessors which they were bound to take under the terms of the lease-deed sublet the premises, the lessors were entitled to recover possession as on a breach of covenant and that neither his forgetfulness nor his *bonâ fide* belief that it was unimportant could entitle him to any equitable relief against forfeiture.

Practice—Adding defendants—Different causes of action—Suit for damages.

Thompson v. The London County Council [1899] 1 Q. B., 840 C. A.

In this case the plaintiff claimed damages from the London County Council for the injury caused to his house by the negligent excavation of the land adjoining his house. On a plea by the defendants that the loss was caused by a Water Company in not completely shutting up their water-main, he applied to make the New River Company defendants in the suit. *Bigham*, J. ordered the joinder of the Company in reversal of the order made by the Master. The Court of Appeal consisting of *A. L. Smith, Collins* and *Romer*, L. JJ. in its turn reversed the order of the Judge and held that the cause of action against the two defendants were separate though the resulting damage was the same and that the New River Company could not be joined as defendants in the suit.

Master and Servant—Neglect of duty—Forgetfulness—Dismissal without Notice.

Baster v. London and County Printing Works [1899] 1 Q. B., 901.

Where a workman in charge of a printing machine caused damage to it to the extent of thirty pounds by his forgetfulness to fix what was known as the toprider before starting the machine and having been dismissed without notice brought this suit for the recovery of two weeks' wages, it was held by the Court (*Darling* and *Channel*, JJ.) upon a case stated by a Metropolitan Magistrate that even a single case of forgetfulness in respect to an important thing might be so grave as to justify dismissal without notice and that having regard to the facts found by the Magistrate, it could not be said that the Magistrate was wrong in dismissing the plaintiff's claim.

Bankruptcy—Administration Order—Executrix paying money in her hands to Official Receiver without retaining debt—Mistake—Claim to be repaid.

In re **Rhoades—Ex parte Rhoades** [1899] 1 Q. B., 905.

In this case the question was whether when an executrix had handed over money in her hands belonging to the testator to the Official Receiver on an order for administration in bankruptcy of his estate and had claimed to prove in bankruptcy for a debt owing to her by the deceased, the executrix could subsequently withdraw the proof of her debt and claim to be paid in full in consideration of her right of retainer in ignorance of which she handed over the whole collections to the Official Receiver. It was held by *Wright* J. that the order for administration did not affect the right of the executrix to retain her debt, that the mere fact of the payment into the hands of the Official Receiver would not put an end to the right of retainer any more than payment into Court or payment to a receiver or payment to a trustee, that though the executrix sought to prove her debt in bankruptcy, she had withdrawn and could withdraw the proof before any adjudication was made upon it and that she was consequently entitled to claim payment of her debt in full.

Negligence—Liability of Charterer for defective Condition of Ship.

Marney v. Scott [1899] 1 Q. B., 986.

The question that arose in this case was whether when the plaintiff at the request of a stevedore engaged by the defendant went on board a ship chartered by him and in the course of loading the ship fell from a defective ladder and was injured, he could claim damages from the

defendant who was the charterer of the ship. The defendant contended that there was no contract between the plaintiff and himself, that having taken care to ascertain from the owners that the ship was fit for service he was not liable to the plaintiff even in tort and that under the terms of the charterparty the owner being bound to repair and keep the ship fit for service, it was the owner who was liable for negligence and not the defendant. *Bigham* J. held that the ship having been placed at the disposal of the defendant, he was the occupier of the ship within the meaning of the decided cases and that having regard to the fact that the ship had just returned from a coasting voyage, and the other circumstances of the case the defendant was in duty bound to devote some attention to the ladder and other appliances which would be used by the stevedore and his labourers in the act of loading. The defendant was therefore held liable in damages to the plaintiff.

Limitation—Tenancy at will—Mortgage by the landlord—Determination of the tenancy—Fresh tenancy—3 and 4 *Will. IV.*; *Ch.* 27, *Ss.* 2 *and* 7.

Jarman v. Hale [1899], 1 Q. B., 994.

In 1882 the plaintiff became the owner of the house now in the occupation of the defendants. The defendants were let into possession in 1883; but no lease or other deed passed between the plaintiff and the defendants and no rent was paid. The plaintiff mortgaged the house in 1893 and it is in evidence that the defendants knew of this mortgage next year. There was also evidence that the defendants subsequently admitted orally and otherwise that the plaintiff was the owner and they were his tenants at will. The County Court Judge held under these circumstances that the original tenancy at will determined on the execution of the legal mortgage and notice of it to the defendants, but that since the plaintiff had parted with the reversion no fresh tenancy at will could be found as between the plaintiff and the defendant, and that the suit was barred by limitation. On appeal the Court of the Queen's Bench (*Darling* and *Channel*, JJ.) held that the County Judge was right in deciding that the tenancy terminated on mortgage and notice to defendants, but that he was wrong in supposing that no fresh tenancy could be created between the mortgagor and the tenant because the mortgagee would not be bound by the tenancy so created and that if a fresh tenancy was proved limitation would run only from the date of such tenancy. They therefore remanded the case for a finding as to whether a fresh tenancy was in fact created between the parties to the suit.

Workmen's Compensation Act—Acting in emergency—Accident "arising" out of or in the course of the employment"—Compensation.

Rees v. Thomas [1899] 1 Q. B., 1015 C. A.

Where a workman whose duty it was to make a report of the state of the mine at an office half-a-mile from the place, got into a fully laden tram-cart of the miner and on the horse bolting got down in order to stop the horse and in so doing fell and was killed, a question was raised as to whether having regard to the facts that the workman rode on full trucks contrary to the rule of the mine and that the workman had no duty to perform in respect of the horse, the workman could be said to have suffered injury in the course of the employment and whether his wife was entitled to any compensation.

The county Court Judge held that the workman's getting into the tram was not such serious and wilful misconduct within the meaning of the Act as to disentitle the plaintiff to compensation, and that the deceased having acted in the interest of his master in an emergency which suddenly arose, the accident should be held to have arisen out of or in the course of his employment and that the plaintiff was entitled to compensation.

On Appeal by the miners the Court of Appeal (*A. L. Smith, Collins* and *Romer*, L.J.) affirmed this Judgment. *Lowe* v. *Pearson* (1899) 1 Q. B., 261, distinguished.

Mortgage of reversion—Interest—Foreclosure—Redemption—Limitation—Waste by Life-tenant—Damages—Barred debt—Retainer.

Dingle *v.* **Coppen and Coppen** *v.* **Dingle** [1899] 1 Ch. 726.

A testator devised certain properties to his wife for life and after her death to the defendant in fee. The defendant mortgaged his reversionary interest to the life-tenant. After her death, her executors brought this action to foreclose the mortgage. The defendant submitted to a decree for foreclosure but claimed damages for waste committed by the life-tenant. This claim was objected to on the ground that by submission to the foreclosure decree the defendant had lost all right to the lands and could not claim damages in respect of waste. On the other hand, it was contended for the defendant that the decree was only an order *nisi* and that the equity to redeem which the defendant still possessed gave him sufficient interest to maintain the counterclaim. *Byrne*, J. was of opinion that without offering to redeem the defendant could not main-

tain the claim but gave leave to amend. Thereupon the defendant amended by offering to redeem on payment of the mortgage amount and six years' interest minus any sum that might be assessed as damages. The claim for damages was based upon the fact that though under the terms of the will it was the duty of the tenant "to keep the premises in good tenantable repair and condition," she had allowed the cottages to fall into disrepair and the marsh lands to be mown more than once during the course of the year and to be depreciated. On this amendment, three new contentions were raised for the plaintiffs.

1. Though in a decree for foreclosure only six years' interest could be claimed, where the defendant insisted upon his equity to redeem, he ought to do equity to the mortgagee by paying all arrears of interest not merely those due in respect of the six years before the action.

2. The plaintiff was entitled to retain the damages in satisfaction of certain advances made to the defendant by the deceased which were admittedly barred by the statute.

3. And the defendant was not entitled to damages for the depreciation of the marsh lands, as the course of dealing by the tenant was the same as and entirely dictated by, that of the testator.

As to the first contention, *Byrne* J. held that though in some cases, the opinion had been expressed that there was no difference between a case of foreclosure and one of redemption in respect of the amount of money to be recovered, the more correct view was that expressed by *Kindersley V. C.* in *Edmund* v. *Waugh* and by *Kay* J. in *In re Marshfield* and that where the mortgagor having lost his *legal right* comes into court insisting on his *equity* to redeem he could not be allowed to excuse his own default in paying the full arrears of interest by setting up the mortgagee's neglect to enforce payment of it.

On the second contention, he held that there was no such claim of retainer recognised by the law, that if such a claim were admissible at all, it was admissible as set-off either legal or equitable and that the party having rightly admitted that this was no case for set-off, the claim to retain damages for a statute-barred debt was not sustainable. *Courtenay* v. *Williams*, 3 Hare 539 and *Jeffs* v. *Wood*, 2 P. Wms., 128 discussed and distinguished.

On the last point *Byrne* J. pronounced for the executors, being of opinion that the tenant for life was not bound to take more care than the testator himself and that having guided herself entirely by the practice of the testator she was not liable in damages to the reversioner.

Mortgage—Equity of Redemption, fetter on—Notice to pay off principal.

Stanley v. Wilde [1899] 1 Ch. 747.

The sub-lessee of a theatre who had an option to purchase the lease from the lessee on payment of £2,000 within a particular time arranged with a stranger for a loan of £2,000. It was agreed between the sub-lessee and his lender that as soon as the lease right was acquired it should be mortgaged to him and a legal mortgage of it executed providing for, among other things, the payment of the loan with interest at 6 per cent. and a third of the net profits of the theatre and for the payment of the money in twenty quarterly instalments of £100. The mortgage was to secure not only the repayment of the £2,000 with interest but also to secure the payment of all other moneys payable by the covenant, so that the mortgage was not redeemable on payment of the principal with interest but must continue to subsist to the very end of the lease in order to secure the payment of the proportion of the profits. Some of the instalments were in arrear and the mortgagee gave notice requiring the payment within three months of the whole amount with interest. He was asked to withdraw the notice but refused to do so. Subsequently on payment of the instalments in arrear, the mortgagee offered to withdraw his notice but now the mortgagor insisted upon paying him the amount due. The money was tendered but the creditor refused to accept the money. The mortgagor now brought this suit to redeem on payment of the amount tendered. It was contended for the defendant that the transaction was in substance a scheme for sharing profits and not really a case of mortgage, that even if it was a mortgage and the covenant to pay profits was an illegal restraint imposed upon the equity of redemption, the covenant was invalid only so far as it affected redemption and was valid as a mere money claim and that the defendant should be allowed to withdraw his notice.

Byrne, J. decided that the case was substantially one of mortgage, that the agreement to secure the payment of one-third of the profit rental by the mortgage (See [1898] 2 Ch. 307, 322) was according to the rule laid down in *Biggs* v. *Hoddinott* an illegal restraint upon the equity of redemption, that there was no authority to show that a provision restraining the right to redeem was enforceable except so far as it clogged redemption and that on the analogy of the cases of notice to quit, it must be held that the mortgagee could not after once insisting upon being paid, go back upon it without the consent of the mortgagor.

Will—Gift—to attesting witness—Codicil unattested—second codicil attested—Legacy, validity of.

In re Trotter—Trotter v. Trotter [1899] 1 Ch. 764.

In this case the question was whether when a legatee under the terms of a will and two codicils, had attested the will and the second codicil, he could take the legacy as directed by the will. It was established by the case of *Anderson* v. *Anderson*, L. R. 13 Eq. 381 that though a will was attested by the legatee, the repetition of the gift in a codicil amounted to a republication of the will and that since the legatee was not an attesting witness to the codicil, he could take the legacy. In this case there was the additional fact that subsequent to the date of the unattested codicil on which the legatee could rely according to *Anderson* v. *Anderson*, there was another codicil republishing the will and the codicil with certain modifications which the legatee had attested. The question was whether this made any difference. It was held by *Byrne*, J. that it made no difference, that the true test was whether there was any one instrument to which the legatee could point out as conferring a valid legacy upon him and that since there was in this case, one instrument, namely, the first codicil when makes a valid gift, the legacy could be recovered.

Minor—Apprenticeship—Benefit of the Minor.

Green v. Thomson [1899] 2 Q. B., p. 1.

The question in this case was whether an apprenticeship deed by which it was provided that the apprentice should serve for a term of five years excepting the usual holidays and days on which the business of the master might be at a standstill through any accident *beyond his control* and the master should pay wages and instruct the apprentice excepting on such days, was valid or whether it was void as not being for the benefit of the minor. It was held by the Court of the Queen's Bench (*Darling* and *Channell*, J.J.) to which it was referred by the Justices of the County of Derby that the true rule was that stated by *A. L. Smith*, L.J. in *Corn* v. *Matthews* [1893] 1 Q. B., 310 at p. 316, to the effect that if the provisions of the will were so manifestly to the disadvantage of the minor as to make it unfair that he should be bound by it, the deed should not be enforced, that as laid down by the above case if the Master had the right reserved by the deed to dispense with the infant's services at his will and pleasure it would be injurious to the interests of the minor to enforce such a contract but that a provision that the minor should neither work nor receive wages for the days

during which business had to be stopped through an accident *beyond* the master's control was not so unreasonable nor so disadvantageous to the infant as to be incapable of enforcement.

Reports of Bankruptcy and Company Cases, Vol. VI., Parts 1 and 2, (*in Exchange*).

JOTTINGS AND CUTTINGS.

We beg to acknowledge with thanks receipt of the following publications :—

Sind Sadar Court Reports, Vol. 1., No. 2. (*in exchange.*)

The Bombay Law Reporter for August (*in exchange*).

The Albany Law Journal for August (*in exchange*).

The Calcutta Weekly Notes for August (*in exchange*).

The Allahabad Weekly Notes for August (*in exchange*).

The Green Bag for August (*in exchange*).

The Canadian Law Times for August (*in exchange*).

The Canada Law Journal for August (*in exchange*).

The last Criminal Sessions of the High Court added another case to the long list of European offenders who having caused the loss of a native life have escaped the penalty of the law. It was admitted for the prisoner that his pistol went off and caused the death of the man who was standing in front of him. The plea was accident. It is unnecessary for us to recapitulate the history of the case; and we do not care to enquire whether or not there was an attempt to commit rape on the unfortunate girl. But the fact remains that the deceased man interceded and he was shot dead. The law presumes that under the circumstances the death was caused intentionally. The plea of accident was for the prisoner to establish. The jury consisting mostly of Europeans, after the prosecution evidence was over and the Doctor examined for the prisoner proved the girl was still a virgin, without waiting to hear the prisoner's evidence as regards the plea of accident, if he had any, or the Judge's charge which would have pointed out that it was for the prisoner to establish his plea, stopped the further trial by a unanimous verdict of "not guilty." There is no doubt that the jury were quite wrong in thus interrupting the trial even assuming that they would be justified in an ultimate verdict of acquittal.

There is no provision of law for the jury to terminate a trial before all the stages are gone through; and a very essential part of the Sessions trial is the charge of the Judge to the jury. No doubt the jury have to decide in the last resort the issue of murder or death by

accident and that they are to do only after the Judge has summed up the case. Supposing the Judge pointed out in his summing up cogent reasons for a conviction calculated to make an impression upon the mind of any jury, how can it be said that a verdict given before such a charge was heard was proper. It seems to us also that the learned Judge who presided at the trial was not right in accepting the verdict. He should have told the jury to wait until the charge was delivered. If the learned Judge was himself of opinion that the prisoner was innocent and that his summing up would only explain the reasons for that conclusion it might be thought that that labour was supererogation. Even in that view, it appears to us that the procedure laid down by the Code should have been conformed to. But in the absence of any material evidence of accident, the Judge himself would have been bound to point out that the burden which lay upon the prisoner had not been discharged.

Whether there was a miscarriage of justice in this case or not, we have no doubt that there has been a material error of procedure. We feel very little doubt that if the Crown Prosecutor placed the case before the Advocate-General, the latter officer would feel compelled to state a case to the full Court for its opinion. The conviction of prisoner O'Hara was set aside by the Full Bench of the Calcutta High Court upon a case stated by the Advocate-General of Bengal. We do not see why the acquittal of Gunner Love should not be set aside by the Full Bench of the Madras High Court upon a case stated by the Madras Advocate-General.

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The Sixty years' rule for Indian High Court Judges:—We think the rule laid down by the Secretary of State that Judges of Indian High Courts should be compulsorily retired at sixty is objectionable from several points of view. We have been very much amused to be told that the Secretary of State is negotiating with each man before appointment for a promise on his part, in writing we suppose, to retire at the appointed time. We wonder whether there is nobody to tell the Secretary of State that Indian Judges hold office during Her Majesty's pleasure and that it is competent to him to signify that pleasure when a High Court Judge passes his sixtieth year. There is no necessity for a contract to enforce the sixty years' rule under the law as it stands.

The question is whether the rule itself is wise. It is a matter of every day occurrence that men are appointed judges in England at such ripe ages as sixty and sixty-five; and they hold the judicial office till they are even past four score years. Englishmen appointed judges in

India do not seem to be more short-lived than their brethren in England. It ought always to be possible for the Secretary of State without any hard and fast rules to retire a judge when his powers have begun to fail. Most English Judges in India retire of their own accord before they are sixty or they have earned their full pension as Judges of the High Court. We have rarely known an instance of any English Judge in India who continued to hold office after his mental or physical energies have begun to fail; nor has there been any instance of a native of India of that description. The only instance of physical debility was that of Sri Romesh Chunder Mitter who retired in consequence at the early age of 50 or 51. We cannot, therefore, see any justification for the rule in the past history of judicial careers in India.

The office of judge is one to which the holder of it should bring the wisdom of age and experience; and ripe years are, therefore, a most important qualification for the office. Once the rule is made that a judge should be retired at sixty, it follows that appointment should be made at such an age as would enable the holder of the office to stay in it sufficiently long to entitle him to the pension of a High Court Judge. As the full period of pensionable service is eleven and a half-years and there will always be two or three years of furlough when there is no active service a person should be appointed judge ordinarily before he is forty-five. It is not always possible to find men below forty-five who by their qualifications and standing at the bar are likely to prove acquisitions to the Bench. Take the case of the seats that are filled by natives. If this rule had been in force, it would have been impossible for such excellent appointments as those of Mr. Justice *Subrahmanya Aiyar* and Mr. Justice *Ranade* to be made. The rule will render the appointment of eminent Indians at the bar to the High Court Bench impossible; and nobody will deny that this is a result much to be deplored.

Again, it is not every person that is appointed to the office of judge that cares to serve long enough to earn a pension. To make an assumption that every person appointed to the office should be able to qualify himself for full pension and appoint, therefore, only those who are below forty-five overlooking the claims of abler seniors is to lower the prestige of the judicial office and to reduce the occupants in the estimation of the public. We trust that this new experiment will not be long continued to the detriment of the administration of justice in the country.

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Working of the United States Supreme Court.

United States Supreme Court Justice Hon. David Brewer, in an article in the Kansas City Lawyer, gives a most interesting insight into the workings of the Supreme Court, from which we quote the following:—

"Let me give an insight into the way business is transacted in this Court. Five days, as I have said, are given each week to the hearing of arguments, the court convening promptly at 12 and adjourning as promptly at 4, and these hours are fully occupied by arguments of counsel. Everything is placed before us in print, records and briefs, each justice having a copy. On Saturday we meet for consultation, and the cases argued during the week are brought up for discussion. Each justice is expected to have made full examination of each record and the questions involved before that time, and if any one has not done so the consideration is postponed one week or until all are ready. As to the vigor and earnestness of these discussions I can only say that I have never known anything to equal them. Ofttimes cases are continued from Saturday to Saturday for further discussion and consideration. When discussion is at an end the roll is called and a vote taken. Each justice is entitled to a book in which is entered on each page, under a blank space for writing the title of a case, the names of all the justices, by means of which he may, if he desires, keep the vote of every justice in every case. I can by turning back to the books which I possess ascertain the vote of every justice in every case that has been considered and determined since I have been on the bench. It often happens that differences of opinion which are indicated by the vote do not appear in the result as announced from the bench, for they who in fact dissent do not consider that question of sufficient importance to publicly record such dissent. Saturday night the chief justice, to whom is assigned the duty of distributing the cases among the justices, sends around a slip showing what cases he has assigned to each justice for the writing of the opinion of the court. This duty of assigning cases is a most delicate one, and could, if unwisely discharged, provoke no little irritation. To the great credit of the present Chief Justice be it said that no one could be more fair and wise than he in such distribution. Up to the time of receiving this slip no one knows what cases he will be called upon to prepare the opinion in. Thereafter, at such time as he has at his command, outside of the hours of session, he writes the opinion. When written it is sent to the printer; nine copies are stricken off, one given to each of the justices, by whom it is examined, criticised and returned with the criticism to the writer. After this it is again brought up in

conference; the suggestions and criticisms are considered and approved, or rejected. These criticisms run both to the matter of argument and style, things omitted and things inserted, and ofttimes the corrections are so far-reaching that the opinion as finally announced bears little resemblance to the one originally prepared. When upon this action the opinion has been placed in such form as is acceptable to the majority, it is ready to be announced on the succeeding Monday morning."—*The Albany Law Journal.*

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Condition of Courts in England:—The condition of the Courts goes from bad to worse. Only, four Judges were sitting in the Queen's Bench Division yesterday, and not a single jury case was in the list. Mr. Justice Darling and Mr. Justice Phillimore formed a Divisional Court, Mr. Justice Mathew sat in the Commercial Court, and Mr. Justice Wright was engaged with the Railway and Canal Commissioners.

The absence of Lord Justice Rigby from the Court of Appeal—due to illness more serious, we regret to learn, than the newspaper reports have indicated—has made it necessary for Lord Justice Smith to announce that probably no further final appeals will be taken in Appeal Court II this side of the Long Vacation, unless the parties agree to have them heard by two Judges. It will be interesting to observe whether the parties to appeals will thus be pressed into consenting to have them tried by two members of the Court. The continued growth of arrears in the Court of Appeal makes it necessary that some change in its constitution should be made without delay. If it is undesirable that the Law Lords should be added to the *ex-officio* members of the tribunal, why cannot retired Judges be made competent to sit with the Lords Justices whenever there is pressing need for their assistance. Sir Edward Fry has recently been sitting with the Judicial Committee of the Privy Council. His services would have been far more useful in the Court of which he was once a member.—*The London Law Journal.*

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Contempt of Court:—Lord Watson, in giving judgment in the *St. Vincent* contempt of Court case, made a noteworthy statement as to the position of Judges who are attacked in this country. 'Committals for contempt of Court by scandalising the Court itself have,' he said, 'become obsolete in England!' Our Judges are not slow to resent any attempt to interfere with the administration of justice by means of public comments on pending cases, but they are prudent enough to leave to public opinion any attacks

made upon themselves. An occupant of the Bench who is assailed in a newspaper on account of the manner in which he discharges his judicial duties has the ordinary right of a citizen to bring an action for libel against his assailant, but his power to punish him summarily for contempt of Court has, according to Lord Watson, become obsolete. This statement is certain to survive the interest that attaches to the particular proceedings in which it was made. Lord Watson was careful to remark that the power that has become obsolete in England may be useful in a Colony with a population of a low order of intelligence; but it is evident that the Acting Chief Justice of St. Vincent, in seeking to uphold the dignity of his Court, did much himself to impair it. He sent to prison for fourteen days a member of the Bar who presented to a local library a copy of a newspaper which contained a vigorous attack upon the manner in which the Acting Chief Justice discharged his duties. Mr. McLeod, who was ignorant of the contents of the newspaper when he handed it to the librarian, appealed to Judicial Committee of the Privy Council, which has allowed his appeal with costs. It is to be hoped that his successful protest against a remarkable piece of judicial tyranny will prevent other Judges from holding an exaggerated notion of their own dignity.

* * *

The chief contribution of West Indian Judges to the Law of England appears to be a series of leading cases on contempt of court. We do not know whether this arises from the aggressiveness of the Colonial Bar, the American freedom of the Colonial Journalist, or the learned leisure of the Bench, which permits it to treat seriously mere trifles. In M'Dermott's case, L. R., 1 P. C., 260; L. R., 2 P. C., 341, the publisher of a paper in British Guiana was sentenced to six months' imprisonment for comments on the administration of justice in the Colony. An appeal to the Judicial Committee was dismissed on the ground that the Court below was a Court of Record, and has a discretionary power to commit which was not the subject of appeal. This opinion seems not now to prevail, or rather committal for contempt is treated a criminal matter, and special leave is given in exercise of the prerogative in criminal cases; but this appears to be done only where the original order is bad in form or substance (see *In re Wallace*, 36, Law J. Rep., P. C. 9; L. R., 1 P. C., 283, and *In re Pollard* L. R., 1 P. C., 106). In a reference from the Bahama Islands (*In re Moseley*, 62 Law J. Rep., P. C. 79; L. R. (1893) App. Cas. 138) it was established that contempt of court is criminal, and can be pardoned by the Governor of

the Colony. The then Chief Justice of the Colony had by his counsel argued to the contrary. The latest precedent is perhaps the strangest. An article was published in a Grenada newspaper reflecting on the judicial conduct of the Acting Chief Justice of St. Vincent. A barrister in St. Vincent, correspondent of the paper but not the writer of the article, lent the public librarian of Grenada a copy of the paper, not having read its contents. For this act he was committed by the Acting Chief Justice for contempt. On appeal the Judicial Committee have held that no contempt in fact was committed, as the appellant did not intend to publish the matter complained of and was under no duty to make himself acquainted with the contents of the paper before he handed it over :—*The London Law Journal.*

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The following is taken from an article on "*The Ethics of Advocacy*" that appeared in the latest number of the Law Quarterly Review.

Every advocate is bound by an unwritten but stringent bond of ethical obligation to take no undue advantage of his tribunal. Some advocates have stronger individualities, and, fortunately or unfortunately, are sometimes better lawyers than some judges before whom they appear. But there are no circumstances in which a counsel is justified in deliberately misrepresenting the law, either in matters of principle, precedent, or practice to a judge who has a weak personality, or who is more ignorant than he ought to be, or who is new to his work, or who is unfamiliar with a particular branch of legal knowledge in which the advocate happens to be an expert. It goes without saying that he must not cite, or rely upon as existent, a statute which has been repealed; nor inform the Court that a statute cited by his opponent has been repealed when he knows that it has been subsequently enacted; nor quote as an authority a decision which he knows has been expressly overruled. The caustic and cynical snub blandly administered to an adventurous advocate of this kind.—I believe by Lord Westbury—'Avoid fallacious reasoning: you are sure sooner or later to be found out. Moreover, never mistake the *law*; the facts are always at your disposal,' is not without its significance. Nothing can ever justify the distortion of known facts; but to misrepresent the law may have as evil consequences as to pervert the facts. Legal and commercial business alike are conducted on the footing that legal principles and rules established by legislative or judicial authority, or by time-honored custom, will be respected by the administrators and practitioners of the law. *Stare decisis* is a rule the indiscriminate departure from which would entail the most serious consequences. Conveyances are framed, wills made, titles quieted, and business generally transacted on the strength of established decisions. Courts, therefore,

are not to be misled nor inveighed into wrong judgments by the misplaced ingenuity of advocates in order to gain victories for their clients in particular cases. If such forensic practices were to obtain generally, truth would be dishonoured and justice dethroned just as much as by the evil arts of suppression, distortion, mutilation and invention, which are universally regarded as indefensible in dealing with matters of fact.

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Tardy delivery of Judgments :—The striking instances of the tardy delivery of reserved judgments have occurred within the past few days. The case of *The Lord Advocate* v. *Wemyss and others*, in which the posthumous judgment of Lord Herschell was read, was argued in the House of Lords on December 15, 1898. More than seven months, therefore elapsed between the hearing of the appeal and the delivery of the judgment. The Judicial Committee of the Privy Council gave judgment on Tuesday in the case of *Cox and Another* v. *Sprigg* in which the arguments were concluded on December 7:—*The London Law Journal.*

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Posthumous Judgments :—A posthumous judgment, though it cannot be counted in the event of a division of opinion among the Law Lords, is not a novelty in the House of Lords; Lord Herschell is not the only judge of whom it may be said, 'He being dead yet speaketh.' Shortly after the death of Lord Campbell in 1861, a judgment he had written was read by Lord Brougham. A more modern precedent is not wanting. The late Lord Justice Chitty sat last January in the Court of Appeal with Lord Halsbury and Lord Justice Smith, and heard an appeal in which judgment was reserved. He died before the decision of the Court was delivered, but his written judgment was read by Lord Justice Smith, and, with the consent of Counsel, was made part of the decision of the Court the technical difficulty, that arose in the Court of Appeal being overcome by giving the order of the Court the date on which the appeal was heard:—*The London Law Journal.*

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Agency—Insurance Policies—Waiver of condition :—An Insurance Agent accepted overdue premiums from the insured in several instances. *Held*, that forfeiture for non-payment of a premium when due may be thus waived although the policy expressly states that no waiver shall be valid unless in writing signed by an officer of the Company. *James* v. *Mutual Life Association*, 49 S. W. Rep., 978 (Mo).

A contrary result has been reached in the case of an express waiver by an agent, on the ground that knowledge by the insured of the terms of his policy is to be presumed and that therefore the principal cannot

be *held* since the agent has clearly exceeded his authority. *Smith* v. *Nigara Insurance Company*, 60 Vt. 682; *Quinlan* v. *Providence Washington Insurance Company*, 133, N. Y., 356. The decisions in accord with the principal case do not question this well settled doctrine of agency, but either decide that such a restriction in a policy is inoperative because inconsistent with the rule of law that there may be a waiver by parol, or find an estoppel arising independently of the agent's authority. *Dwelling House Insurance Company* v. *Dowdell*, 55 Ill. App. 622; 1 Joyce Ins., S. 43. The exact ground of the decision in the principal case is not clear but it may well be supported on the second reason suggested. The insurer must have known of the overdue payment of the previous premiums, and, having made no objection should be estopped from insisting on the forfeiture:—*Harvard Law Review.*

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Contracts—Consideration—Forbearance.—Held that a forbearance to sue upon a groundless claim is a sufficient consideration to support the promise of a third party to pay the amount claimed. *Di Iorio* v. *Di Biazio*, 42 Atl. Rep. 1114 (R. I.)

The Court here adopts a doctrine which was first laid down with respect to cases of this kind in *Callisher* v. *Bischoff Sheim*, L. R., 59 B., 449. There is no intimation in the opinion of the Court that to constitute a sufficient consideration to support a promise the thing done by the promisee must be a legal detriment to him. The case is, therefore, directly in line with the position taken in 12 Harvard Law Review 515, that in the present state of the authorities consideration should be defined to be "any act or forbearance by one person given in exchange for the promise of another." See 12 Harvard Law Review, p. 276.—*Harvard Law Review.*

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Property—Percolating Waters—Right to withdraw:—The city built extensive wells which drew off the water percolating through the plaintiff's land, thus rendering it unfit for crops. *Held* that the defendant was liable for the damage done. *Porbell* v. *City of New York*, 56 N. Y. Supp. 790 (Sup. Ct. Sp. Term).

This decision is contra to *Chasemore* v. *Richards*, 7 H. L. Cas. 349, but follows the only American case in which the exact point has been adjudicated. *Smith* v. *City of Brooklyn*, 46 N. Y. Supp. 141. The Court lays down the general doctrine that the right to percolating water comprises only the right to use it in the owner's land. But by the weight of authority the right to such water is absolute. *Acton* v. *Blundell*, 12 M. and W., 324; *Chatfield* v. *Wilson*, 28 Vt. 49. And moreover, while the principal case asserts that it is the subject of correlative rights it rejects the only logical conclusion, namely, that the reasonableness of the user is

the measure of those rights. *Bassett* v. *Salisbury Manufacturing Company*, 43 N. H., 569. The actual result, however, accords with the view taken by the New Hampshire Court, and in a jurisdiction where the question is still open that view might well be followed. The ends of practical justice and convenience can only be reached by restricting to reasonable limits, the right to use percolating water, nor does such restriction seem inconsistent with the land-owner's natural rights.

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An Injunction against Visiting a Woman.—An injunction against visiting another man's wife or writing to her or in any way communicating with her was recently sustained by the Texas Court of criminal appeals. The decision was made in a *habeas corpus* proceeding for release from imprisonment for contempt of court by disobeying the injunction. The prisoner boldly attacked the injunction as an infringement upon his constitutional right to freedom of speech and the pursuit of happiness, but the court did not so consider it. The chief contention was that a purely personal right could not be protected by equity; but the court, quoting at some length from the note in 37 L. R. A., 783, held that such contention is not supported either by reason or by the actual practice of equity courts. While the general rules of equity were deemed sufficient to support the injunction, the court called attention to Tex. Rev. Stat. art. 2989, authorizing an injunction whenever relief to which a person is entitled "requires the restraining of some act prejudicial to the applicant." In this case the plaintiff sued for damages on account of a partial alienation of his wife's affections, and sought an injunction to prevent a further alienation.

But the rights of the woman in the case remain to be considered. She is not mere property of her husband which he can have sequestered or put into the hands of a receiver. She is herself a person with rights and "troubles of her own." Whatever may be the husband's remedies as against third persons, has he any right to hedge up her freedom? The English case of *Reg.* v. *Jackson* (1891) 1 Q. B., 671, denied the right of a husband to confine his wife in his own house in order to give him an opportunity to regain her affections and prevent her from coming under the influence of her relatives who might alienate her from him. But a wife's freedom of action is in some degree limited by injunctions to keep other people from communicating with her. Precedents showing that the courts may award injunctions against courting a ward of court do not apply to a married woman of full age. If, at her husband's suit, another man may be restrained from visiting her, then it would seem that at her suit her husband might be restrained from visiting another woman, and that woman restrained from receiving his visits. We should go toward government by injunction at a rapid rate if courts could

interfere with the liberty of persons of full age and sound mind by regulating their social relations and restraining them from having communication with each other in order to keep them from improper influences.—*Case and Comment.*

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Parent and Child.—An illegitimate child of an unmarried man and a married woman is held, in *Ives* v. *McNicoll* (Ohio) 43 L. R. A. 772, to be legitimated by their subsequent marriage after the mother's divorce from the husband, by virtue of a statutory provision for legitimation by marriage of parents. The fact that the mother was married at the time of the birth of the child is held immaterial.—*Case and Comment.*

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His wit saved him.—Detroit used to have a lawyer who was shrewd enough to show contempt of court without incurring danger of the penalty that would have been visited upon an offender less diplomatic. He was at one time being heard in an important matter before the Supreme Court, and made an assertion which elicited from one of the judges: "That is not the law, sir."

"Pardon me, your honor," with a deferential bow, "it was the law until a minute ago. Now we accept a new principle established by a supreme authority."

On another occasion he was reading from an imposing looking book in support of a position that he had taken upon a legal question.

"Just a moment," interrupted the supreme justice himself; "do you mean to say that you are reading good law?"

"Not at all, your honor; only Supreme Court decisions."

The most cutting thing he ever said to this same court was during the consideration of a desperate case in which he had not a leg to stand upon. He made a bold contention which was fallacious but plausible from beginning to end.

"Blank," said the court severely, "I would not try to convert the average justice of the peace with such an argument as that."

"Nor I," was the quick response, "but I had what I considered reliable information that none of the honorable members of this honorable court had ever served in that capacity."

"You have practised before me for years, Blank," said a circuit judge at one time, "and this is the first time you have shown contempt."

"Yes, your honor," answered Blank, "I have wonderful self-control!"

—Exchange.—*The Albany Law Journal.*

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Two Types of Judicial Opinion.—Two eminent Massachusetts jurists, now on the bench, illustrate in their written opinions two widely contrasted forms of judicial utterance, says the New York Law Journal. The opinions of Mr. Justice Gray, of the Supreme Court of the United

States, are very voluminous. The reader may safely rely upon his having cited every authority of importance bearing upon a case in which he writes. Moreover, the previous decisions are not shoveled in indiscriminately with the cheap affectation of erudition characteristic of ambitious but dull judges. The current of authority is systematically marked out, and the cases of great significance are conscientiously analyzed and their precise bearing and weight indicated. Finally, there is displayed original reasoning power of a high order, which enables the author not only to classify and assimilate, but also to evolve practical conclusions, which always command respect and usually concurrence of conviction. Mr. Justice Gray's opinions are scientific, legal essays, taking the case at bar as a timely text, and in the end deciding it. These compositions undoubtedly belong to what may be called the old school of judicial composition. They hark back to earlier American times, when the volume of litigation was small, but judges had all the time there was, and when the distinguishing of inapplicable English precedents and the creation of an American jurisprudence, founded upon, but not identical with, the English common law, were important judicial functions. The greatest quality of John Marshall's genius was his instinctive perception of what should be taken and what should be modified or left.

The opinions of Mr. Justice Holmes, of the Supreme Judicial Court of Massachusetts, unlike those of Mr. Justice Gray, are cast upon the English judicial model. He takes it for granted that his readers know or will look up the general law of the subject down to date, and considers only such cases as may directly affect the point at issue. To show with what acuteness he discriminates and selects would be entirely superfluous. Though on the great question of the proper attitude and policy of American courts toward so-called "Labour" controversies we radically disagree with him, we heartily admire his judicial strength and usual sanity of view, being the joint product of well-digested earning and thoughtful common sense.

As to the respective types of judicial opinion, the one for which Mr. Justice Holmes stands is to be recommended as a general model. In such a tribunal as the Supreme Court of the United States, which, for the Federal Courts and for many classes of litigation arising in State courts, exercises final appellate jurisdiction, an exhaustive historical and analytical essay is sometimes legitimate and valuable. Occasionally also in supreme State tribunals such a production may be desirable. But, for the ordinary run of cases, it behoves a judge to begin where his predecessors left off and go on from that point. Only by following this method can the appalling increase of volume of the reports be kept down. Too many long opinions are merely padded for pedantic display, or represent the result of the judge's study of principles that are really trite, but happened to be unfamiliar to him.—*The Albany Law Journal.*

NOTES OF AMERICAN CASES.

A drawee bank which pays the good-faith holder of a forged check on which an indorsement is forged is held, in *First National Bank* v. *Marshalltown State Bank* (Iowa) 44 L. R. A., 131, to have no right to recover back the money paid.

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A very striking application of the rule that a bank is not liable for negligence of a notary employed by it is made in *First National Bank* v. *German Bank* (Iowa) 44 L. R. A., 133, where a bank is held not to be liable for the negligence of its assistant cashier, who was a notary public in failing to give proper notice of the dishonor of an inland draft which the bank held for collection.

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Members of a trade association who combine to induce or compel other persons not to deal or enter into contracts with one who will not join the association or conform his prices to those fixed by the association are held, in *Doremus* v. *Hennessy* (Ill.) 43 L. R. A., 797, to be liable for the injuries caused to him by loss of business resulting from such combination.

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The withdrawal of patronage from a person by members of an association by concerted action is held, in *Boutwell* v. *Merr* (Vt.) 43 L. R. A., 803, to be illegal when their concert of action is due to the coercion of a by-law imposing a fine or penalty upon any member who violates it, and the fact that they voluntarily assumed the obligations of their association is held not to relieve the by-law from its coercive effect.

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Publication pending trial of an action, of an article concerning the cause, which is calculated to prejudice the jury and prevent a fair trial, is held, in *Telegram Newspaper Co.* v. *Com.* (Mass) 44 L. R. A., 159, to constitute a contempt for which a corporation may be criminally liable.

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An unusual case as to what constitutes a sitting of a judge in a cause is that of *State, ex rel. Hezel* v. *Bland* (Mo.) 43 L. R. A., 845, where it is held that a judge sat in the cause so as to be entitled to dissent from the decision and cause the case to be certified to another court on the ground of a conflict of decisions, although he had had no consultation with the other judges on the merits of the case but was on the bench when it was argued and submitted, and agreed to the withholding of the decision for a time, and, when that was rendered in his absence, sent to the judge who wrote the opinion a memorandum stating that it conflicted with another decision and that a motion for rehearing ought to be granted, and also filed a dissenting opinion, while he was also on the bench

but not consulted when motion was overruled by associates in accordance with a previous understanding between them, of which they had notified him.

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Jurisdiction to inquire into and control the internal management of a foreign corporation is denied in *Condon* v. *Mutual Reserve Fund L. Asso.* (Md.) 44 L. R. A., 149, in which an injunction against an assessment upon a member by a foreign corporation was refused.

Proof of a signature by mark is held, in *Wienecke* v. *Arbin* (Md.) 44 L. R. A., 142, to be insufficiently made nearly twenty-five years afterwards by testimony of an attesting witness that he certainly saw the signature made or he would not have put his name there, when he is unable to recall the circumstances or the place of the alleged signing,—especially when there is no proof that the maker of the instrument made or authorized its delivery, or that it was read or explained to the maker, who could not read.

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An ordinance prohibiting hackmen and draymen from stopping their vehicles on certain streets except when actually engaged in receiving or delivering passengers or goods is held, in *Ex parte Battis* (Tex.) 43 L. R. A., 863, to be in excess of charter authority to prevent the encumbering of streets.

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A claim of duress as ground for annulling a marriage was rejected in *Collins* v. *Ryan* (La.) 43 L. R. A., 814, where the proof was that a reluctant and passive consent to the performance of the marriage ceremony was yielded by the husband under pressure brought to bear upon him because it was his duty, under the circumstances, to marry the girl. The other authorities on duress to avoid marriage are collated in the annotation to this case.

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A policy of insurance on a steam fire engine, hose pipe, and hose cart while located and contained in a fire engine house, "and not elsewhere," is held, in *L'Anse* v. *Fire Association* (Mich.) 43 L. R. A., 838, to be insufficient to cover the property while being used in attempting to extinguish a fire several hundred feet from the engine house.

Insurance of a kind not known at the time of the passage of a statute exempting insurance on the kinds of business for which corporations may be formed, such as that of guaranteeing the fidelity of officers and the performance of contracts, is held, in *People ex rel. Kasson* v. *Rose* (*Ill.*) 44 L. R. A., 124, to be within the provisions of that statute.

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An ordinance requiring a license for the business of contracting for public work is held, in *Figg* v. *Thompson* (Ky.) 44 L. R. A., 135, to be

unconstitutional, because it tends to create a monopoly and increase the burden of property owners, where the statutes require assessments for the cost of improvements to be made upon abutting owners.

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An ordinance requiring a license fee to be paid as a condition of buying claims is held, in *Bitzer* v. *Thompson* (Ky.) 44 L. R. A., 141, to be unconstitutional in case of a person who buys, merely as an investment, a few claims admitted to be just and due but which are not paid because of lack of funds.

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The pardoning power of a governor is held, in *Sharp* v. *State ex rel. Cason* (Tenn.) 43 L. R. A., 788, to extend to cases of contempt.

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An illegitimate child of an unmarried man and a married woman is held, in *Ives* v. *McNicoll* (Ohio) 43 L. R. A., 772, to be legitimated by their subsequent marriage after the mother's divorce from the husband, by virtue of a statutory provision for legitimation by marriage of parents. The fact that the mother was married at the time of the birth of the child is held immaterial.

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A pledgee's purchase of the pledged property at his own sale is held, in *Glidden* v. *Mechanics' Nat. Bank* (Ohio) 43 L. R. A., 737, to leave the pledge still in force, unless the pledgor elects to treat the transaction as a valid sale, in which event he can hold the pledgee accountable for the net proceeds, but cannot hold him liable for conversion so long as the pledgee has possession of the property and can restore it on payment of the debt for which it is pledged. The annotation to this case presents the prior decisions on the conversion of pledged property by the pledgee's invalid sale.

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Notwithstanding the rule that a geographical name cannot be a trademark, it is held, in *American Waltham Watch Co.* v. *United States Watch Co.* (Mass.) 43 L. R. A., 826, that the original manufacturer of Waltham watches may have an injunction against the use of the word "Waltham" by another manufacturer of watches at the same place, unless distinguishing words are used to prevent deception of the public.

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A statute authorizing associations or unions of working men to adopt labels or devices to distinguish the products of their labor, is held constitutional in *Perkins* v. *Heert* (N. Y.) 43 L. R A., 858.